

# DECISION 2009-06-22

A2-2010-05

## Travel Agency Commissioner Area 2

Helene Cedertorn  
Nybohovsbacken 34B  
117 63 Stockholm  
Sweden

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### **The Matter:**

Request for Travel Agency Commissioner (TAC) Review of decision the 25<sup>th</sup> of March 2010 by Airline to terminate appointment as Agent; now question of granting TAC Review or not

### **Applicant:**

A.I. Kajee (PTY) Limited (Agent/AI Kajee)  
Represented by:  
Farhad Hussain, lawyer at G H Ismael & Associates  
543 Ridge Road, Durban 4001, P O Box 70266 Overport 4067

### **Respondent:**

South African Airways (PTY) Limited (Airline/SAA)  
Represented by:  
Faan Coetzee, lawyer at DLA Cliffe Dekker Hofmeyr Inc  
6 Sandown Valley Crescent, Sandown, Sandton

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### **Background, formalities:**

In a decision dated the 17<sup>th</sup> of Feb 2010 SAA withdrew the plating authority of AI Kajee to issue tickets on behalf of SAA. The decision had, according to its wording, immediate effect.

AI Kajee requested a Travel Agency Review of the decision by e-mail (original later received by postal mail) the 19<sup>th</sup> of March 2010.

After some correspondence, SAA withdrew its decision of the 17<sup>th</sup> of Feb and sent a new notice of termination dated the 25<sup>th</sup> of March 2010. The new decision to terminate the Agent's authority to issue tickets on behalf of SAA had an effective date of 30<sup>th</sup> of April 2010. According to the notice the termination was based on IATA Resolution 824 section 13.1.1. and IATA Resolution 818g section 2.5. and 3.5. Furthermore the notice contained a list of reasons for the termination (of no immediate interest here as the initial issue is only whether to grant TAC Review or not).

After some correspondence AI Kajee in an e-mail the 23<sup>rd</sup> of April 2010 requested Travel Agency Review of the second notice of termination (the notice dated the 25<sup>th</sup> of March 2010).

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When asked by the undersigned for a response, SAA requested an extension of the deadline as the lawyer in charge of this matter was travelling. After some correspondence SAA agreed to extend the deadline for the termination to come into effect until 31<sup>st</sup> May 2010, and was thereby granted an extension of the deadline to submit a response until 21<sup>st</sup> of May 2010. A response from SAA was submitted the 21<sup>st</sup> of May 2010.

SAA disputed in its response that the decision to terminate the appointment as its agent would threaten the commercial survival of Al Kajee. The undersigned therefore asked the Applicant to provide its comments and/or possible evidence with regards to this, with no need to at this stage argue in matters not relevant for the question of the “commercial survival”, if this would save time. (The argumentation by the parties in this matter is quite extensive).

In an e-mail the 11<sup>th</sup> of June the Applicant provided its response.

In an e-mail the 17<sup>th</sup> of June the Respondent provided its comments to what had been argued by the Applicant.

## **Rules of interest**

### The TAC Office and TAC Review

The Office of the Travel Agency Commissioner (TAC) is created by IATA Resolution 820d. In Attachment A of this resolution it is described that the TAC is an independent arbitrator appointed jointly by the International Air Transport Association the Universal Federation of Travel Agency Associations and the World Travel Agency Associations Alliance, to conduct reviews and act with respect to decisions and/or actions affecting Agents and applicants under the IATA Agency programme.

The procedures under which the TAC operates are contained in IATA Resolution 820e. In accordance with section 1.1.8., the Commissioner shall review and rule on cases initiated by an Agent who considers that its commercial survival is threatened by a Member’s individual decision preventing it from acting as an Agent for, or from issuing Traffic documents on behalf of, such Member.

It shall be noted that the TAC does not have authority to overrule resolutions, or change the material content of any rules (see IATA Res 820e section 2.7.)

### The PSAA and other resolutions of interest

To become an Accredited Agent an Agent signs a Passenger Sales Agency Agreement (hereafter referred to as PSAA) in accordance with IATA Resolution 824. The PSAA becomes effective between the Agent and the Carrier upon the appointment of the Agent by such Carrier in accordance with the Sales Agency Rules in effect in the country of the Agent’s Location.

– Accordingly Resolution 824, as well as other resolutions as in this case Resolution 818g (Passenger Sales Agency Rules), becomes part of the contractual relationship between the Carrier and the Agent upon appointment by the Carrier (or Member with another term used in other resolutions).

According to Resolution 818g section 3.5.1. a Member (Airline) may cancel the appointment of an Agent to act for it. In Resolution 824 section 13.2 it is stated that notice of termination shall be made in writing and take effect no sooner than the last day of the month following the month in which the termination is given, unless otherwise specified in the Sales Agency Rules.

### **Reason for decision**

It is clearly so that SAA has a right to cancel the appointment of Al Kajee as its agent, based on the contractual terms as laid down in IATA Resolutions 824 and 818g, if SAA takes into consideration the formalities of the rules. - However the IATA Member Airlines have accepted that the Agents have a right to have such decisions reviewed by the Travel Agency Commissioner, based on Res 820e section 1.1.8 as adopted by the Member Airlines by the PaConf, in a situation where the **commercial survival** of the agent is threatened. The mandate of the TAC is thereby limited to these situations and a TAC Review may only be granted with regards to a termination notice from an Airline if this requisite is fulfilled. The burden of proof for the fulfilment of the requisite rests primarily with the Agent.

The parties in this matter are in dispute on whether the decision of SAA threatens the commercial survival of Al Kajee or not. The below description of the arguments of the parties is a shortened version of the original arguments, as summarised by the undersigned.

The Respondent bases its original argumentation with regards to the issue of whether the commercial survival of the Applicant is threatened or not, on arguments relating to that the Applicant has two additional IATA numbers, through which SAA tickets may be sold. The Respondent also states that during the period Jan to Dec 2009 the Applicant derived 32 percent of its turnover from SAA, and 23 percent of its turnover from another airline, and the balance from various other airlines. During the period Jan to Mar 2010 the Applicant derived 30 percent of its turnover on sales of SAA tickets. The Respondent claims that the Applicant relies on an unsubstantiated allegation, with reference to its turnover, that its commercial survival is threatened. The Applicant has not explained its cost structure, the effect that a cancellation of the one agency number may have on turnover, and to what extent new business could be generated in changing the Applicant's business model.

The Applicants main arguments, with regards to the question of whether its commercial survival is threatened or not, is that its sales on other IATA numbers than the number issued to the legal entity applying for review, could not be taken into account. Furthermore the Applicant states that 33.7 percent of its total sales the year 2009 derived from sales of SAA tickets, the closest other airline ticket sales reflected a sales volume of 18 percent of the total sales volume. The remaining sales were dispersed randomly amongst various other carriers. During the first period of 2010 up to April the Applicant has achieved sales of SAA tickets reflecting 34.47 percent of the total sales volume. It is clear that the decision of the Respondent would cause a net effect of a projected loss of revenue to the Applicant of 30-35 percent, which seen in light of that the other volume is spread amongst various carriers, would have the undeniable result of causing the Applicant severe financial hardship. The Applicant has firmly structured its business model along the lines of being a registered agent of the Respondent. The Applicant has marketed itself as and its corporate entity as SAA Travel Centre agency since 1999/2000. It would lose its identity in the market place and would have to re-brand itself including all signage and corporate identity. Together with the

projected loss of 30-35 percent of ticket sales revenue the Applicant faces financial ruin. It will also lose the lucrative market of HAJ pilgrimage for pilgrims to Saudi Arabia. Moreover the Applicant receives 2-2.5 percent as an incentive bonus in respect of total SAA sales, as well as incentive bonus for the use and sales on the Galileo portal. These amounts has historically equated to the profits that the Applicant has earned over the years. The losses could not be absorbed by sales on other carriers as postulated by the Respondent. It is the sales of SAA tickets that sustains the Applicant's business and allows the Applicant to carry the other airline carriers.

The Respondent has thereafter provided some counter arguments as follows: The Respondent contends on the Applicants own assumptions and figures that the commercial survival of the Applicant is at stake. The concept of commercial survival depends upon the effect of the notification on the business of the Applicant and not only its income but the difference between income and expenses. The Applicant has merely dealt with the effect of the notification on the gross income. The figures of the Applicant shows that the Applicant, on its own estimation of loss of revenue between 30-35 percent, will still be in the same position as during its 2009 with regards to income of sales. The Applicant has not made out a case that it will not commercially survive 2010 in the absence of earning revenue from the Respondent. In addition the Applicant will have sufficient time to refocus its business model and marketing during the rest of 2010, to increase revenue from other airlines during the remainder of 2010 and for 2011 and the future.

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The undersigned finds that the arguments from both parties have certain substance. I do agree with the Applicant that the Applicant shall be seen as one separate legal entity, and that the possibility to use other legal entity's IATA numbers for issuing tickets is not in itself a valid argument for claiming that the commercial survival is not threatened. – However it is not only the loss of sales volume that should be evaluated when assessing the requisite "commercial survival", though of course it is an important factor. The Applicant will have to bear the burden of inconvenience, and also financial burdens, without this constituting a situation that would be deemed as threatening the commercial survival of the Applicant. The Applicant may for example have to change its business model and use other operators in the market for issuing the tickets. The change of signage and corporate identity is no doubt both costly and inconvenient, but still considering that the burden of proof rests with the Applicant, I cannot find that the Applicant has provided enough substantial evidence of the financial impact of the action by the Respondent to fulfil the requisite that its commercial survival is threatened. I therefore do not grant TAC Review in this matter.

- I want to make a final statement as a general advice to the parties. I note by the general argumentation of the parties that this matter has become more or less a legal battle. This is rarely a fruitful way forward in discussions where the parties should seek common grounds from a commercial perspective, in order to be able to work together in trust and confidence as is necessary in an agent – principal (airline) relationship. I would advise the parties to try to meet open minded, preferably without legal representation, and discuss the commercial aspects of their relationship and constructively try to find solutions on possible issues.

## Decision

The request for TAC Review of the notice of termination is dismissed.

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Decided in Stockholm 2010-06-22

Helene Cedertorn

Signed original copies of this decision will be sent by postal mail to the representatives of the parties.

Copy will be sent this day to the IATA Agency Administrator and the representatives of the parties by e-mail.

**Note:**

**The parties may, if considered aggrieved by this decision, seek review by arbitration in accordance with the provisions of Resolution 818g, section 12.**